

WILLAMETTE UNIVERSITY

Mitigating Spirals of Conflict in DOD Source Selections

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Does the bid protest process work?

- Is it efficient? Yes
- Can changes mitigate bid protests?
Yes
- Are changes cost-effective? Possibly



Interviews

- Executives/counsel at prime contractors
- Attorneys at GAO
- Outside bid protest counsel
- Vendor contract managers
- Officials in OSD
- Officials and in-house attorneys
 - AFMC
 - NAVAIR
 - DLA
- Senate Committee Staff
- Industry Trade and Professional Associations

Ury, Brett, Goldberg 1988



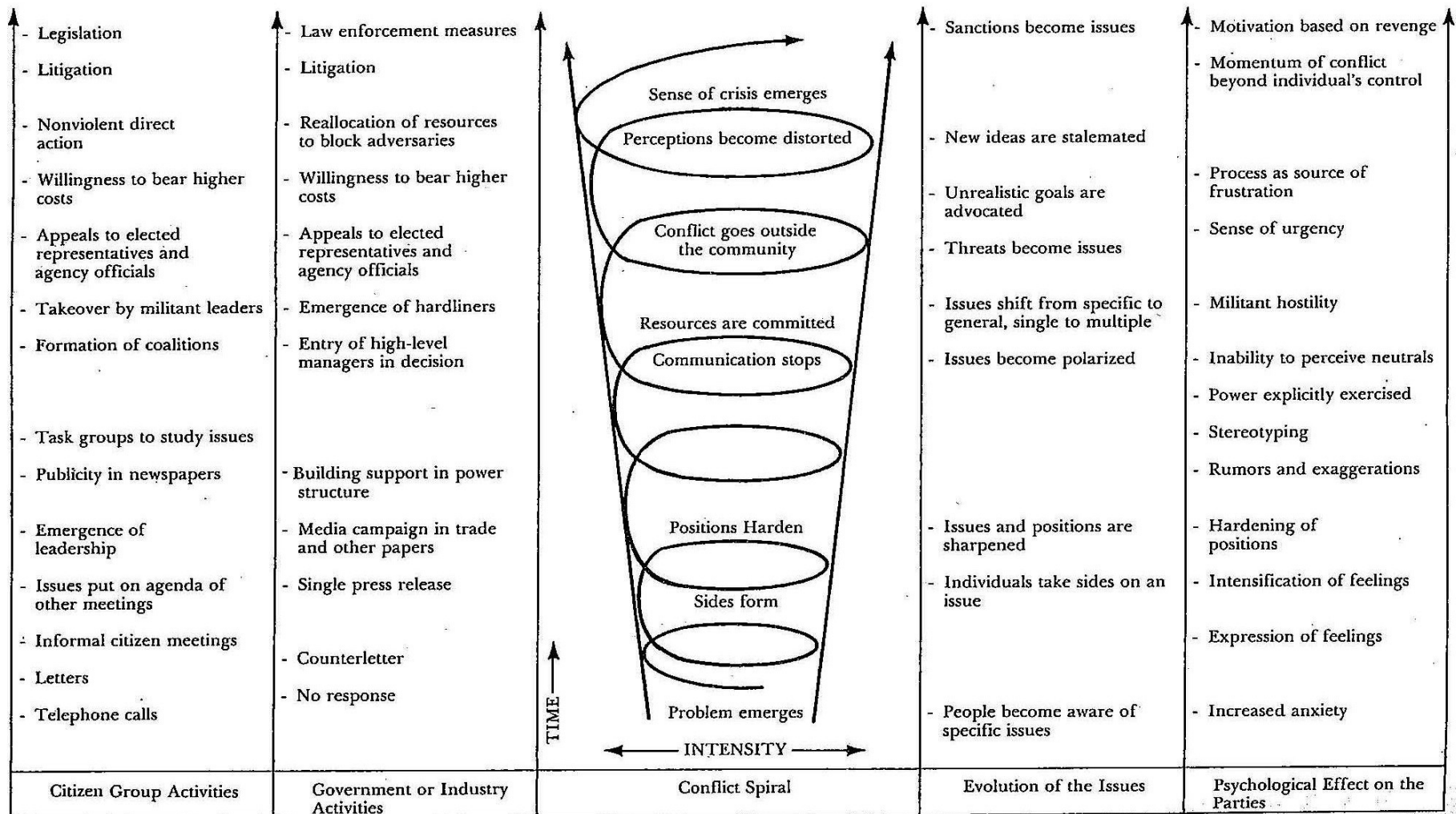
Sources of distrust and conflict

- Insufficient information
- Inconsistency
- Perceptions of bias



Pathology: Carpenter and Kennedy,

Figure 1. Spiral of Unmanaged Conflict.



Insufficient information

- Contracting agency resists acknowledging a problem
- Protestor involves an attorney
- Contracting agency perceives a threat and provides minimal debrief
- Protestor combs debrief for grounds to protest



Inconsistencies: Real and perceived

- Across agencies
 - Minimal vs. SSA-level debrief
 - Minimal vs. complete documentation
- Across businesses
 - Some seek to improve
 - Some seek competitive advantage
- GAO
 - Pursuit of multiple missions
 - Standards of materiality and reasonableness



Perceptions of bias

1. Rejected offerors blame the process
2. “Best value” subjectivity can induce distrust
3. Small companies lack process expertise
4. Companies recruit contracting officers
5. Contracting commands solicit expertise from suppliers to define requirements
6. GAO is beholden to Congress



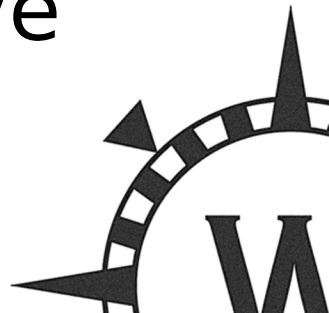
Principles of dispute system design

1. Put the focus on interests
2. Provide loop backs to interest-based negotiation
3. Provide low-cost rights and power backups
4. Build in consultation before, feedback after
5. Provide motivation, skills and resources



Principle 1: Put the focus on interests

- Solve a mutual problem, face-to-face, informally: agency level review
- ADR concept is not new
- Likelihood of more protests makes agency level review more efficacious
- Requiring agency level review provides incentives to agencies to document decisions and improve disclosure



Principle 2: Provide loop-backs to interests

- Corrective actions
- GAO: predictive dispute resolution
- Rejected offerors who repeatedly protest without success compensate agencies for their costs
- Document frivolous protest behavior as part of past performance data



Principle 3: Low-cost rights and power backups

GAO

- should monitor its standards of materiality and reasonableness
- should apply higher standard to incumbents
- should defer to agencies when incumbents protest



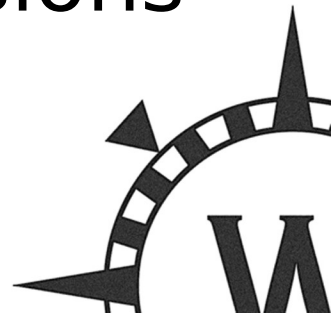
Principle 4: Consultation before, feedback after

Debriefings

- Supply same information as to SSA
- OSD monitor quality of debriefings
- Mitigate adversarial tone
- Record

GAO reports to Congress

- Track outcomes of agency decisions



Principle 5: Provide motivation, skills, resources

- Train agency staff in negotiation and mediation
- Train peer reviewers
- Create source solicitation simulations
- Require contractors to have certification in the source selection process
- Manage risk in source selection

